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No. 92-1246

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SALLIE ELIZABETH JOHNSTON-TAYLOR, et al.,

Petitioners,

v.

PHILIP J. GANNON, Individually and as President of LANSING COMMUNITY COLLEGE, and the BOARD OF TRUSTEES OF LANSING COMMUNITY COLLEGE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly determined that there existed no genuine issue of material fact when Respondents relied on three education-related criteria, and not race, in selecting two employees for layoff?

2. Whether the Court of Appeals properly affirmed the entry of summary judgment for Respondents on Petitioners' procedural due process claim when, prior to the termination of their employment, both employees were told of the reasons for their selection and given a meaningful opportunity to respond?

3. Whether the Court of Appeals correctly concluded that a conflict in testimony concerning one pre-termination meeting did not require reversal of summary judgment for Respondents on the procedural due process claim where the undisputed evidence showed that a second pre-termination meeting satisfied all constitutional requirements?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, the Board of Trustees of Lansing Community College (the "College") and Philip J. Gannon, the College's former President, submit this Brief in Opposition to the Petition for Writ of Certiorari. The principal legal issues raised by the Petition rely upon the unsupported premise that racial preferences were used in selecting Edward Taylor and David Arganian for layoff. However, the courts below correctly concluded that there existed no genuine issue of material fact that the layoff selections were based, not upon race, but upon (a) performance evaluations, (b) enrollment trends, and (c) the

ratio of full-time to part-time faculty within departments. The courts below also found no genuine issue of material fact that Taylor and Arganian were given constitutionally adequate pre-termination notice of these factors and an opportunity to respond. Thus, the Petition attempts to raise issues unsupported by the record, raises no question meriting review, and should be denied.

CONSTITUTIONAL PROVISIONS INVOLVED

The Petition's "Constitutional and Statutory Provisions Involved" section incorrectly lists the Equal Protection Clause of the Fourteenth Amendment. Because no equal protection claims were raised in Petitioners' Complaint, none are involved here.

The Complaint, which Petitioners have never sought to amend, contains only two counts raising constitutional claims [R.1].[1] Count I alleges that the College's 1983 layoff of Arganian and Taylor violated their substantive and procedural due process rights under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Count II alleges that Taylor was selected for layoff in retaliation for exercising his rights under the First Amendment.[2] Counts III and IV allege violations of Michigan state statutes.

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[1] "R.____" refers to the document number listed on the District Court docket sheet filed with the Court of Appeals. "Tr. Vol. ____, p. ____" refers to the volume and page number of the transcript [R.196-98] from the evidentiary hearing conducted on March 14, 15 and 25, 1991. The exhibits admitted into evidence at the hearing [R.216-26] are referred to as "Jt. Ex. ____," "Def. Ex. ____," and "Pl. Ex. ____." References to "App. ____" are to pages in Appendices I and II to the Petition for Writ of Certiorari.

[2] The Petition seeks no review of the entry of summary judgment for Respondents on Count II.

The Complaint contains no reference to racial preferences or discrimination, or to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

After lengthy discovery, the District Court entered summary judgment for Respondents on Petitioners' procedural and substantive due process claims [App. II 49a-82a]. A panel of the Sixth Circuit Court of Appeals subsequently remanded these claims to the District Court to allow Petitioners to augment the factual record [*Johnston-Taylor I*, App. I 11a-23a].

Following a three-day evidentiary hearing, the District Court again granted summary judgment to Respondents (App. I 24a-46a). On Petitioners' second appeal, the same panel of the Sixth Circuit Court of Appeals affirmed the summary judgment order in an unpublished, per curiam decision [*Johnston-Taylor II*, App. I 2a-10a]. The Sixth Circuit subsequently denied Petitioners' petition for rehearing and for rehearing en banc [App. I, 1-a].

In the face of the rigorous and meticulous judicial scrutiny applied below, Petitioners now seek review relying on a constitutional ground never alleged in the Complaint, advancing an erroneous and misconceived theory of "strict scrutiny," and grounding their arguments on unsupported and immaterial facts. The pertinent facts are set forth below.

A. The College's Budgetary Crisis

The 1983 layoff of Arganian and Taylor (and 20 other College employees) was prompted by a serious budget shortfall. As the District Court correctly observed, the exist-

ence of "the budget shortfall and the steps taken by the [College] to address the shortfall was not rebutted" by Petitioners [App. I 45a].

In April 1983, the College faced a budget deficit of $2,331,000 for the fiscal year beginning July 1, 1983. Despite draconian cost-cutting measures, the deficit exceeded $343,000 at the end of the 1982-83 fiscal year, and the College's chief accrediting agency warned that expenditures had to be reduced further. Accordingly, the College concluded that it needed to reduce staff to balance the budget [Tr. Vol. I, p. 48; Tr. Vol. II, pp. 213-215; Jt. Ex. 1, pp. 232-35].

B. The Selection of Arganian and Taylor

The dean of each College division was provided with a 14-point list of criteria, agreed upon by the College and its five employee unions. The dean of each division was responsible for identifying the individuals within the division who should be recommended for layoff [Tr., Vol. II, pp. 231-232; Pl. Ex. 7, pp. 38-39].

Arganian and Taylor taught in the Division of Arts & Science, headed by Dean Sam Kintzer [Tr. Vol. II, p. 233]. Kintzer, like the other division deans, chose the criteria most relevant to his division [Tr. Vol. II, pp. 231-32]. The criteria selected differed from one division to the next, depending on each division's needs [Tr. Vol. II, pp. 231-32, 238-44, 306].

Dean Kintzer determined that the criteria most relevant to his division were (1) declining enrollment in specific programs over a three-year period, (2) ratio of full-time to part-time faculty, and (3) performance evaluations over the prior three years [Tr. Vol. II, pp. 232-42; Def. Ex. W, pp. 24-26]. Applying those criteria, Kintzer recommended

the layoff of three individuals: Arganian from Humanities, Taylor from Social Science, and John Manion from Communications [Tr. Vol. II, p. 238]. Manion, a minority group member (Asian/Pacific Islander), was subsequently saved from layoff by the resignation of a faculty member from a different department whose position Manion was able to fill [Tr. Vol. II, pp. 238-40].

The recommendations of Dean Kintzer and the other deans were referred to the Board of Trustees, which approved the layoffs on July 22, 1983, to become effective 45 days later on September 6, 1983 [Jt. Ex. 1, pp. 24-38 (7-22-83 minutes); Tr. Vol. II, pp. 251-52, 255; App. II 120a].

C. Pre-Termination Notice and Opportunities to Respond

On July 22, 1983, written notices were sent to Arganian, Taylor, and the 20 other employees selected for layoff, advising them that the Board of Trustees had voted to lay them off in an effort to balance the budget. The notices stated that the layoffs would not become effective for 45 days [App. II 120a; Jt. Ex. 5, p. 28].

During that 45-day period, College officials conducted several meetings with Arganian and Taylor. At each meeting Arganian and Taylor were provided with the reasons they had been selected for layoff and an opportunity to respond.

1. On July 25, 1983, Arganian met with his department chairperson, Joseph Anderson, who cited the three factors used to select Arganian for layoff [Tr. Vol. I, pp. 155-157; Def. Ex. X, pp. 181-182]. Arganian did not claim that the criteria had been misapplied, but said that these were not appropriate criteria for selecting faculty for layoff [Tr. Vol. I, pp. 155-156; Def. Ex. X, p. 182].

2. Two days after Arganian's meeting with Anderson, Arganian and his attorney met with Ron Dove, the College's Director of Personnel, and discussed the layoff [Tr. Vol. I, pp. 157-167, Vol. II, pp. 249-53; Def. Ex. X, pp. 182-185]. Although there is some dispute about exactly what was said in this meeting, neither Arganian nor his attorney asked for any additional information or further meetings [Tr. Vol. III, pp. 430-432].

3. The same day, July 27, 1983, Dove met with Taylor. Taylor admitted that Dove "started to tell me why" he had been selected for layoff but "I told him I really didn't want to hear it" [Def. Ex. V, p. 253; Tr. Vol. II, pp. 253-56, Vol. III, p. 379]. Taylor did not ask Dove for further information or for another meeting [Tr. Vol. II, p. 255].

4. On August 25, 1983, a hearing was held on Arganian's and Taylor's union contract grievances protesting their layoff [Tr. Vol. I, pp. 202-04; Vol. II, pp. 256-57, 261-68, Vol. III, pp. 433-44; Def. Exs. Q and R]. Dove presented the specific reasons and findings that led to the selection of Arganian and Taylor for layoff, including the exact numbers and percentages used in Dean Kintzer's application of the selected criteria [Tr. Vol. II, pp. 265-67, 342-43]. Both Arganian and Taylor were provided with an opportunity to respond and to question Dove about the reasons for their layoff [Tr. Vol. II, pp. 266-68].

On September 6, 1983, after all the meetings described above, the employment of Arganian, Taylor, and the 20 other employees selected for layoff was terminated [Tr. Vol. I, pp. 162-63, Vol. II, pp. 247, 255; App. 120a].

D. Post-Termination Arbitration Hearing

Two additional grievance hearings were conducted before Arganian's and Taylor's grievances were submitted

to binding arbitration [Def. Ex. T; Tr. Vol. II, pp. 260-61, 268, 271]. Following a four-day adversary hearing and the filing of post-hearing briefs, Arbitrator Howard Cole issued a 28-page decision denying the grievances of both Arganian and Taylor. Arbitrator Cole concluded:

> [T]he administration's layoff selections reflected good faith managerial judgments reached after due consideration of all relevant and contractually legitimate factors (including the mutually agreed upon criteria listed in the July 8, 1983 memorandum) and without reliance upon irrelevant or contractually illegitimate factors.

[Def. Ex. T, pp. 21-22].

E. Proceedings in the District Court and Court of Appeals

In July 1986, following issuance of the Arbitrator's decision, Petitioners filed a four-count Complaint [R.1] against the College's Board of Trustees and its President. Petitioners alleged that the layoff of faculty violated Arganian and Taylor's substantive and procedural due process rights (Count I); that Taylor was selected for layoff in retaliation for exercising his First Amendment rights (Count II); that Taylor's subsequent suicide was actionable under the Michigan Wrongful Death Act (Count III); and that Arganian and Taylor were selected for layoff because of their age in violation of Michigan's Elliot-Larsen Civil Rights Act (Count IV). The Complaint, which Petitioners never sought to amend, contains no reference to racial preferences, racial discrimination, or equal protection.

Following nearly three years of discovery, the District Court granted Defendants' Motion for Summary Judgment on April 25, 1989 [App. II 49a-82a]. The District Court held that Arganian and Taylor were not entitled to a pre-

termination hearing because the dismissals were part of an economically motivated reduction in force rather than "for cause." The District Court concluded that post-termination hearing procedures under the collective bargaining agreement satisfied the requirements of due process in this case [App. I 58a-69a]. The District Court also entered summary judgment for Defendants on Petitioners' substantive due process claim and Taylor's First Amendment claim, and dismissed the pendent state claims [App. II 69a-79a].

Petitioners appealed. The Sixth Circuit Court of Appeals held that even though Arganian and Taylor had not been discharged for misconduct, due process required they "not be discharged without receiving a hearing in which they are informed of the ground for their dismissal and given the opportunity to challenge the sufficiency of those grounds" [*Johnston-Taylor I*, App. I 21a]. The Sixth Circuit remanded the case for an evidentiary hearing on the issue of what pre-termination procedures, if any, had been provided. It also instructed the District Court to take additional evidence on Arganian and Taylor's substantive due process claims [App. I 22a-23a].

The District Court held a three-day hearing in March 1991, taking evidence concerning the College's financial crisis, the method by which the 22 employees were selected for layoff, the notice Arganian and Taylor received of the reasons for their layoff, and the opportunities they had to respond prior to termination of their employment. In a 20-page opinion, the District Court concluded that there were no genuine issues of material fact and that Respondents were entitled to judgment as a matter of law on Petitioners' procedural and substantive due process claims [App. I 24a-46a]. Again Petitioners appealed.

In an unpublished per curiam decision [*Johnston-Taylor II*, App. I 2a-10a], the Sixth Circuit affirmed the entry of summary judgment for Respondents on Petitioners' federal claims and dismissal of the pendent state law claims. Addressing Petitioners' procedural due process claim, the Court of Appeals stated that the "record developed at the evidentiary hearing on remand clearly reveals that [Arganian and Taylor] were given sufficient notice and opportunity to challenge the grounds for their lay-off prior to the effective date of the layoff" [App. I 9a]. Specifically, the appellate court noted that both received written notice of their impending layoff and an explanation that the basis for their layoff was a staff reduction due to a financial exigency; that within a week both met with the College's personnel director to discuss the reasons for their selection; and that both were given "a more elaborate pre-termination hearing" at the subsequent level-two grievance hearing [App. I 9a-10a].

The Sixth Circuit also affirmed the District Court's entry of summary judgment on Petitioners' substantive due process claims. In doing so, the appellate court ruled that the undisputed facts showed that the College faced exigent financial circumstances and that, contrary to the argument advanced by Petitioners, in selecting Arts & Science faculty for layoff there existed a rational basis for Dean Kintzer's "choice of three of the fourteen criteria" [App. I 10a]. The Court of Appeals also concluded that Petitioners' "equal protection and free speech arguments [were] without merit" [App. I 10a].

After Petitioners' request for a rehearing and a rehearing en banc was unanimously denied, Petitioners filed a petition for a writ of certiorari.

REASONS WHY THE PETITION SHOULD BE DENIED

A. The Equal Protection Issue Petitioners Belatedly Raise Is Unsupported in the Record and Was Properly Rejected as Being Without Merit

Petitioners' chief complaint (Pet. 17) is that the Court of Appeals in *Johnston-Taylor II* "dismissed Petitioners' equal protection claim of a racial preference termination without any application on the record of the strict scrutiny analysis" required by *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). Petitioners contend that certiorari should be granted and the Sixth Circuit ordered to set forth in more detail exactly why it concluded that Petitioners' equal protection argument was without merit [Pet. 17-22]. This contention raises no question meriting review or warranting exercise of this Court's power of supervision under Supreme Court Rule 10.1(a). Specifically, the contention is unavailing for three reasons.

First, Petitioners failed to raise their equal protection argument in a timely fashion. Unlike the nonminority teachers in *Wygant* who "brought suit . . . alleging violations of the Equal Protection Clause" (476 U.S. at 272), Petitioners' Complaint here [R.1] makes no mention of equal protection, affirmative action, or racial discrimination or preferences. The only form of discrimination mentioned in the Complaint, which Petitioners have never sought to amend, is the allegation that Arganian and Taylor were laid off because of their *age* in violation of Michigan law. [R.1, Complaint ¶¶ 88-89]. Indeed, in their briefs to the Sixth Circuit, Petitioners characterized their claim, not as a violation of equal protection, but as a "violation of substantive due process," apparently recog-

nizing that the pleadings raised no equal protection claim [*Johnston-Taylor II*, Plaintiff-Appellants' Brf. 27 and Reply Brf. 13-16].

Second, Petitioners' "racial preferences" argument finds no support in the record viewed as a whole. Petitioners, who raised the issue for the first time during oral argument before the Court of Appeals in *Johnston-Taylor I*, presented no probative evidence that racial preferences resulted in the selection for layoff of Taylor or Arganian. Indeed, it is undisputed that the third Arts & Science faculty member selected by Kintzer, John Manion, was himself a minority. Moreover, the only minority employee whom Petitioners could even arguably claim was "exempted" from layoff because of race, Tapera Chiwocha, was in fact retained because of his higher performance evaluations, not because of "racial preferences" [Tr. Vol. II, p. 241].[3] As the lower courts recognized, Petitioners' belated claim of racial preferences is a make-weight, unsupported by probative record evidence.

Third, Petitioners' contention that the Sixth Circuit "ignored" *Wygant* and other decisions addressing governmental preferences based upon race [Pet. 19] misconceives the concept of "strict scrutiny." The doctrine refers to the heightened standard applied by the judiciary in evaluating governmental classifications which are in fact based upon race. *See Graham v. Richardson*, 403 U.S. 365, 371-72 (1971). The doctrine does not, as Petitioners apparently contend, require a court to render a detailed written opin-

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[3] The language from Dean Kintzer's deposition cited by Petitioners [Pet. 11] is not to the contrary. That testimony addresses what Kintzer was told by someone else, not the criteria Kintzer himself applied in recommending three Arts & Science faculty (one of whom was a minority group member) for layoff.

ion any time a party *alleges* that a governmental body has employed a racial classification.

This is particularly true where, as here, (a) the pleadings contain no equal protection claim [R.1], (b) the record provides no support for the belated assertion that a racial classification or preference was actually employed, (c) the claimants devoted only three pages of their 48-page appellate brief to the argument, and (d) even then, the argument was couched in terms of substantive due process, not equal protection. Under these circumstances, the Court of Appeals properly rejected Petitioners' equal protection argument as "without merit" [App. I 10a].

Indeed, summary rejection is a routine, if not required, method of disposing of unsubstantial or frivolous arguments in an era marked by excessive strains on the federal judiciary's resources. *See, e.g., King v. Innovation Books*, 976 F.2d 824, 833 (2d Cir. 1992) (we have "considered appellants' remaining arguments . . . and found them to be without merit"); *Green v. Johnson*, 977 F.2d 1383, 1391 (10th Cir. 1992) (same). Accordingly, the Sixth Circuit's rejection of Petitioners' untimely and unsupported equal protection argument cannot in any way be characterized as having "so far departed from the accepted and usual course of judicial proceedings" as to warrant the extraordinary exercise of this Court's "power of supervision" under Rule 10.1(a).

B. Petitioners' Procedural Due Process Argument Relies Upon the Mistaken Factual Premise that Racial Preferences Were Used in the Selection of Arganian and Taylor and Thereby Seeks Review of an Issue Unsupported by the Record

Petitioners' second "Question Presented" is whether procedural due process requires "pre- or post-termination

notice of the use of a racial preference" in the selection of public college faculty for layoff [Pet. i, 22-28]. This argument, like the first, relies upon the unsupported factual premise that "racial preferences" were used in selecting Arganian and Taylor for layoff. The courts below correctly concluded that there existed no genuine issue of material fact that the layoff selections were based, not upon race, but upon three objective, pedagogical criteria [App. I 7a-8a, 39a-40a]. Because this argument is unsupported by the record, it raises no question meriting review.

Petitioners' related assertion that the Sixth Circuit departed from existing Supreme Court precedent [Pet. 27] is also mistaken. Petitioners, citing *Loudermill v. Cleveland Board of Education*, 470 U.S. 532 (1985), complain that the Sixth Circuit "did not apply any balancing test . . . in determining what pre-termination due process" Petitioners deserved [Pet. 27]. The Sixth Circuit did not explicitly discuss the *Mathews v. Eldridge*, 425 U.S. 319 (1976) balancing test in determining what process was due because, as the Sixth Circuit observed in *Johnston-Taylor I*, "the law is quite clear on this question" [App. I 21a]. Specifically, the Sixth Circuit stated that professors "with tenure or a continuing contract" may not be discharged without receiving a pre-termination hearing in which "they are informed of the grounds for their dismissal and given an opportunity to challenge the sufficiency of those grounds" [App. I 21a]; *cf. Loudermill*, 470 U.S. at 542-46 (applying balancing analysis and concluding that prior to termination a "tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story"). Thus, the Sixth Circuit's decision, rather than departing from existing Supreme Court precedent, simply recognized the well-settled state of the law on this issue.

Petitioners' reliance on *McDonald v. City of West Branch*, 466 U.S. 284 (1984), is simply inapposite. In *McDonald*, this Court held that an arbitration award under a collective bargaining agreement should not be afforded *res judicata* effect in a subsequent action under 42 U.S.C. § 1983. Unlike the lower court in *McDonald*, neither the District Court nor the Sixth Circuit in the present case held that Arbitrator Cole's award precluded Petitioners' federal claims under § 1983.

Finally, and apparently as an afterthought, Petitioners cite four lower court decisions, asserting that "no court" has approved the layoff of tenured faculty "when the alleged deficit is only 1.1%" of the school's budget [Pet. 28]. This substantive due process argument bears no rational relationship to the procedural due process issue raised in the "Question Presented."

Moreover, this argument is fact specific. Petitioners do not contend that the lower courts applied a different legal standard, thereby creating a split in the circuits. Rather, they argue that the lower courts misapplied that standard in rejecting Petitioners' substantive due process claim. In doing so, Petitioners in effect ask this Court to define, as a matter of substantive due process, the minimum budgetary deficit which will justify the layoffs of tenured faculty by a state-supported educational institution. Clearly, this honorable Court does not grant certiorari "to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925).

C. The Lower Courts Correctly Concluded that Conflicting Testimony About Arganian's First Pre-Termination Hearing Was Insufficient to Create a Genuine Issue of Material Fact Given the Undisputed Evidence About the Second Pre-Termination Hearing

Petitioners' third "Question Presented" is whether Rule 56 of the Federal Rules of Civil Procedure "authorize a trial court to determine credibility on a motion for summary judgment" (Pet. i). The answer, of course, is "no." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Thus, the Question Presented raises no important issue of federal law. The law is well-settled.

Moreover, a review of the record shows that the Sixth Circuit correctly applied this rule. The conflicting testimony regarding Arganian's first meeting with the College's Director of Personnel was clearly insufficient to create a genuine issue of material fact precluding summary judgment because there is no dispute that in the *second* pre-termination meeting with Arganian, Dove provided the specific reasons for Arganian's layoff, including the numbers and percentages used by Kintzer in the selection process [Tr. Vol. II, pp. 265-67, 342-43]. Procedural due process requires pre-termination notice of the reasons for the employee's dismissal; it does not require that the information be provided on two separate occasions. Thus, any dispute over the specificity provided in the first meeting was immaterial for purposes of Respondents' motion for summary judgment. *See Anderson*, 477 U.S. at 247-248 ("the mere existence of *some* alleged factual dispute will not effect an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact") (emphasis in original).

Petitioners' related complaint that the District Court abused its discretion in allowing Respondents to amend an interrogatory answer just prior to the evidentiary hearing [Pet. 30] provides no grounds for a grant of certiorari. The interrogatory answer was amended in accordance with Rule 26(e)(2) of the Federal Rules of Civil Procedure three days after Petitioners brought it to Respondents' attention [R.180, p. 5; R.185]. Moreover, Petitioners did not object that the amendment prevented them from preparing for the evidentiary hearing. Indeed, Petitioners specifically asked the District Court *not* to reschedule the hearing [R.183, p. 2]. Accordingly, the District Court's ruling that the amendment was seasonable [R.192] cannot be considered an abuse of discretion and provides no basis for review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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